RE MOHAMAD FADZIMI YAAKUB,

EX P UNITED MALAYAN BANKING CORP BHD

T SELVENTHIRANATHAN J
[BANKRUPTCY NO: D1-29-426-1995]
24 SEPTEMBER 1997

BANKRUPTCY: *Practice and procedure - Bankruptcy proceedings - Whether within the ambit of writs of execution - Rules of the High Court 1980, O. 46*

BANKRUPTCY: *Notice - Issue of - Whether bankruptcy notice may be issued before obtaining final judgment or order - Execution - Leave of court*

BANKRUPTCY: *Adjudication and receiving orders - Annulment - Appeal against annulment - Bankruptcy Act 1967, s. 3(1)(i) & (g) - Bankruptcy Rules 1969, r. 276 - Rules of the High Court 1980, O. 46*

The judgment creditor (the plaintiff) had entered judgment in default of appearance against 3 defendants on 31 December 1985. The 2nd and 3rd defendants were guarantors for a loan extended by the judgment creditor to the 1st defendant, a firm. The 3rd defendant was the judgment debtor herein. Payments by instalments were subsequently negotiated between the 2nd and 3rd defendants with the judgment creditor. When the judgment debtor failed to honour his commitment to pay, the judgment creditor initiated bankruptcy proceedings against the judgment debtor on 28 February 1995. The judgment debtor was duly served personally with all process but took no steps to show cause against the bankruptcy petition. Instead he allowed the adjudication and receiving orders ('AO & RO') to be made against him through default on 18 April 1996.

After nearly one year later, on 9 April 1997, the judgment debtor applied to the Senior Assistant Registrar ('the SAR') to annul the AO & RO made against him. The judgment debtor's explanation for the delay was that the settlement of the judgment sum was handled by the 2nd defendant, his sister, directly with the judgment creditor and he had only recently been able to obtain the necessary documents to make the application for annulment. Also, the judgment debtor had engaged new solicitors to handle his case.

The SAR allowed the application by the judgment debtor and annulled the the AO & RO made against him. The SAR's decision was made solely on the basis of non-compliance by the judgment creditor with O. 46 of the Rules of High Court 1980 ('the RHC') as the SAR was of the view that bankruptcy proceedings are a form of execution proceedings. The present case was an appeal by the judgment creditor against the decision of the SAR.

Held:

[1] Bankruptcy proceedings do **not** fall within the ambit of writs of execution in O. 46 of the RHC.

[2] A creditor can issue a bankruptcy notice only when he has obtained a final judgment or a final order. The judgment or order must be one on which the creditor is in a position to issue execution so that if execution cannot be issued at all, no bankruptcy notice can be issued. If the execution can be issued only with the leave of the court, the creditor must obtain such leave before he can issue a bankruptcy notice.

[3] The court is not at liberty to brush aside the explicit provisions of s. 3(1)(i) of the Bankruptcy Act 1967 ('the Act') merely because of r. 276 of the Bankruptcy Rules 1969 ('the BR'). If there is any conflict between these two measures, s. 3(1)(i) of the Act will have an overriding effect since it ranks as a principal legislation whereas the BR is a subsidiary legislation. The UK decisions in *Re Ida* and *Re Woodall* are of direct relevance in construing s. 3(1)(g) and (i) of the Act and should be followed.

[4] The judgment debtor only raised non-compliance with O. 46 of the RHC in his submission and not in his affidavit in support of his application. Had he raised this issue when he was served with the bankruptcy notice itself two years ago, it would have enabled the judgment creditor to obtain the requisite leave and initiate fresh bankruptcy proceedings against the judgment debtor. However, the judgment debtor elected not to do so and must therefore bear the consequences of his neglect himself.

[5] Having regard to the fact that the judgment creditor would totally lose its right of enforcing the judgment after 31 December 1997 and that O. 46 of the RHC only required the judgment creditor to obtain leave before proceeding and did not bar altogether the bringing of proceedings for execution after six years of the judgment being obtained, the failure to obtain leave shall make the issuance of the bankruptcy notice voidable only and **not** void *ab initio*. Otherwise, it would result in injustice being perpetrated upon the judgment creditor whose mistake laid in giving repeated opportunities to the judgment debtor to honour his undertaking to settle the debt in instalment payments as agreed upon between the parties.

[Appeal allowed.]

Cases referred to:
Re Ide, ex p Ide [1886] 17 QBD 755 ***(foll)***
Re Seow Yin Fong, ex p United Orient Leasing Company Bhd and Another Case [1994] 2 CLJ 845 ***(refd)***
Re Woodall, ex p Woodall [1884] 13 QBD 479 ***(foll)***
Wee Chow Yong v. Public Finance Bhd [1990] 1 CLJ 176 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 3(1), 105
Bankruptcy Rules 1969, r. 117, 276
Rules of the High Court 1980, O. 46

Other sources referred to:
The Supreme Court Practice, 1982, paras 46/2/1 & 46/2/2

For the appellant/judgment creditor - Tan Pheck San; M/s Abdul Ghani & Assoc
For the respondent/judgment debtor - M Kayveas (S Sumathi with him) M/s Blanche Kayveas & Co

JUDGMENT

T Selventhiranathan J:

This is an appeal against the decision of the senior assistant registrar whereby he allowed an application by the judgment debtor to annul the adjudication and receiving orders made against the judgment debtor on 18 April 1996.

The judgment creditor entered judgment in default of appearance against three defendants in Kuala Lumpur Sessions Court summons C1831-85 on 31 December 1985. The second and third defendants were apparently guarantors for a loan extended to the first defendant, a firm, by the plaintiff in the summons, the judgment creditor in these proceedings. The third defendant in the summons is the judgment debtor here.

The judgment debtor applied vide encl. (13) nearly one year later, on 9 April 1997, to annul the adjudication and receiving orders made against him on 18 April 1996. His only explanation for the delay in doing so was that the settlement of the judgment sum was being handled by the second defendant (his sister) directly with the judgment creditor and he had only recently been able to obtain all necessary documents to make the relevant application. This, coupled with the fact that the judgment debtor had engaged new solicitors, seemed to find favour with the registrar as explaining the delay.

With respect, I am unable to agree as the judgment debtor has failed to explain what caused the difficulty, if any, in obtaining the necessary documents, particularly so when the second defendant is resident in Petaling Jaya and he in Kuala Lumpur. At any rate, the bulk of the documents upon which he relies are letters forwarding payments of instalments by the second defendant to the judgment creditor.

However, noteworthy among the letters exhibited by the judgment debtor is one at the last page of exh. 'MF-5' to his affidavit at encl. (12) dated 23 March 1992 wherein the second defendant, in response to the judgment creditor's request to make fresh repayment proposals, agreed to pay RM500 per month on behalf of herself and adverted to a meeting the judgment debtor had with the judgment creditor wherein it was agreed that he also would pay RM500 per month towards the settlement of the judgment sum. This was accepted by the judgment creditor in almost identical letters written on 12 May 1992 to the judgment debtor and the second defendant. Yet the judgment debtor, who purportedly faced difficulty obtaining the necessary documents from the second defendant, was able to exhibit in his affidavit the letter written by the judgment creditor to the second defendant, his sister, but not that written to him and it required the judgment creditor to unearth that letter in exh. 'HBA-3' to encl. (15)!

These almost identical letters written on 12 May 1992 were directed individually to the judgment debtor and the second defendant and they read as follows:

> We refer to your letter dated 23-3-92.
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> After due deliberation, we wish to inform you that we are agreeable to your proposal to repay the loan as follows:
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> 1. To pay $500 per month with effect from April 1992 for a period of 6 months subject to our further review;
> 2. To forward us 6 post-dated cheques;
> 3. Repayment must be prompt and regular. In the event of any default in any one instalment, we will proceed with legal action against you without further reference; and
> 4. The above acceptance is on a 'Without Prejudice' basis.

In the case of the second defendant, the following words were added at the end of para. 2 above:

(Two cheques dated 2-4-1992 and 6-5-1992 of $500 each has [sic] been received by us);

whereas in the case of the judgment debtor the following words were added after para. 4 appearing above:

Meanwhile, kindly forward us a cheque for $1,000 for April and May 1992 instalments.

It would appear that when the judgment debtor failed to honour his commitment, the judgment creditor wrote to him on 8 June 1993 as follows, which again only came to light in the affidavit of the judgment creditor:

We refer to the above matter and regret to note that no payment response [sic] has been received from you.

As such, you are hereby given a Final Reminder to forward us the sum of $69,621.07 as at 31/5/1993 with further interest thereon or submit to us a fresh repayment programme within 14 days from the date hereof, failing which we shall recommence with bankruptcy action against you without further reference to you.

Your cooperation is much appreciated.

Subsequent to this, the judgment creditor initiated bankruptcy proceedings against the judgment debtor on 28 February 1995. The judgment debtor was duly served personally with all process but took no steps whatsoever to show cause against the petition under r. 117 of the Bankruptcy Rules 1969 and instead allowed the adjudication and receiving orders to be made against him through default.

On 14 June 1995, after the initiation of the bankruptcy proceedings but before the making of the orders thereon, the judgment debtor approached the judgment creditor offering to pay RM500 per month in instalment towards the judgment sum, which offer was rejected by the judgment creditor by a letter of 26 July 1995 wherein the judgment creditor returned to the judgment debtor six cheques for RM500 each which had been sent.

The registrar, in hearing the application of the judgment debtor, rejected the various arguments raised on the latter's behalf as he was of the view that these should have been raised at the stage of the hearing of the creditor's petition. I agree.

However, the registrar, after accepting the reason for the delay in making the application went on to annul the adjudication and receiving orders solely on the basis of non-compliance with O. 46 of the Rules of the High Court 1980 as he was of the view that bankruptcy proceedings are a form of execution proceedings. To quote from his grounds of decision:

Kelimanya pihak judgment debtor telah menimbulkan isu di mana perlaksanaan telah dilakukan melebihi dari enam tahun. Ternyata tak dinafikan bahawa suatu kebenaran/leave telah diperolehi untuk melaksanakan, perlaksanaan melebihi enam tahun. Tetapi apa yang ditimbulkan adalah perlaksanaan dilakukan lebih dari satu tahun di mana kebenaran diberikan. Kebenaran perlaksanaan telah diperolehi pada 20/7/1993. Jika dilihat, bankruptcy notice adalah bertarikh 28/2/1995. Ini menunjukkan perlaksanaan dibuat dua tahun selepas perintah kebenaran perlaksanaan melebihi enam tahun itu diperolehi. Pihak judgment debtor telah merujuk kepada O. 46 r. 2(1) Rules of the High Court 1980 (RHC).

Pihak judgment creditor pula menyatakan bahawa O. 46 r. 1 ini tidak terpakai pada kes-kes kebankrapan. Beliau nyatakan bankruptcy notice dan creditor's petition diserahkan tetapi judgment debtor tetap tidak membantah. Suatu final judgment telah diperolehi dan pemiutang ada hak untuk menuntut.

Mahkamah merujuk kepada Akta dan kaedah di mana tiada apa-apa penyataan berkenaan perkara ini.

Oleh yang demikian kaedah 276 ini adalah terpakai. Di sini mahkamah perlu merujuk kepada RHC. Melihat kepada O. 46 r. 2(1) penyataan 'A writ of execution to enforce a judgment ...' Di dalam keadaan ini tindakan kebankrapan adalah suatu bentuk yang digunakan untuk menguatkuasakan penghakiman. Oleh itu O. 46 ini adalah meliputi prosiding kebankrapan.

Mahkamah seterusnya merujuk O. 46 r. 2(1) dan O. 46 r. 3 ternyata selepas kebenaran diberi masa selama satu tahun untuk menguatkuasa maka permohonan untuk perlaksanaan seterusnya perlu dibuat. Selepas kebenaran diberi judgment creditor perlu menguatkuasa perlaksanaan dalam masa satu tahun dan tarikh kebenaran diberi.

Jika dilihat di sini ternyata judgment creditor telah melakukan perlaksanaan tanpa mendapat kebenaran/leave apabila kebenaran yang pertama diberi telahpun luput dalam jangkamasa satu tahun. Dengan ini penfailan bankruptcy notice ini adalah salah. Adalah dilihat bankruptcy notice ini difailkan tanpa mendapat kebenaran/leave terdahulu.

Oleh yang demikian mahkamah telah menerima alasan ini sebagai alasan untuk mengenepikan perintah AORO terhadap si bankrap.

...

Oleh yang demikian di sini mahkamah telah memutuskan bahawa dengan kegagalan pihak judgment creditor untuk melaksanakan penghakiman di dalam jangkamasa setahun kebenaran diberikan maka menyebabkan prosiding ini menjadi salah. Tindakan bankruptcy notice yang bertarikh 28/2/1995 ini menunjukkan perlunya suatu permohonan kebenaran perlaksanaan yang baru diperolehi. Kegagalan mematuhi O. 46 ini menyebabkan kertas-kertas tidak teratur dan satu perintah AORO ini sepatutnya tidak diberikan.

With respect, bankruptcy proceedings do not fall within the ambit of writs of execution in O. 46: see Vol. 1 of *The Supreme Court Practice 1982* para. 46/2/1 stating that:

> The issue of a bankruptcy notice is not a form of execution (*Re a Bankruptcy Notice* [1898] 1 QB 383 per Chitty LJ at p. 387). Nevertheless, in practice the Bankruptcy Court requires the **fiat** of a Master (QBD) before a notice will issue on a judgment more than six years old.

However, this point was considered by Edgar Joseph Jr J (now FCJ) in *Wee Chow Yong t/a Vienna Music Centre v. Public Finance Bhd* [1989] 3 MLJ 508 where his Lordship stated as follows at pp. 509 to 511 of the report:

> First of all, the bankruptcy notice having been issued on 12 May 1988 and served upon the judgment debtor on 9 June 1988 although the judgment debt upon which it was grounded was dated 13 May 1982, it was said that proceedings in bankruptcy had been commenced more than six years after judgment had been recovered, without leave of the court as required under O. 46 r. 2(1) of the Rules of the High Court 1980. The case of *Re v. Gopal, ex p Bank Buruh (M) Bhd* [1987] 1 CLJ 602 was cited in support.
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> ...
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> Before I embark upon a consideration of the UK decisions, I would make the preliminary observation that the issue of a bankruptcy notice is not execution to enforce a judgment. (See eg *Re A Bankruptcy Notice* [1898] 1 QB 383 per Chitty LJ at p. 386). At most, it seems to me that the issue of a bankruptcy notice may be regarded as a species of practical enforcement.
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> I shall now take the cases in the UK to assist me in my task of interpreting s. 3(1)(g) of our Act.
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> In *Re Ide, ex p Ide* [1886] 17 QBD 755 the creditor had obtained judgment against a firm and had purported to issue a bankruptcy notice founded on that judgment against an individual partner. By s. 4 sub-s. 1(g) of the Bankruptcy Act 1883, the statutory predecessor of the Bankruptcy Act 1914, it was a condition for the validity of a bankruptcy notice founded on a final judgment or final order that execution had not been stayed thereon. The Court of Appeal held that on the proper construction of the subsection, to entitle a creditor to issue a bankruptcy notice he must be in a position to issue execution on his judgment at the time when he issued his bankruptcy notice. In other words – I would interpolate – in addition to there being no stay on the judgment, there must be no other impediment to issue execution on the judgment. Accordingly, O. XLII r. 10(c) of the RSC (the predecessor of the present O. 81 r. 5(4)) requiring the leave of the court to issue execution, was held to be such an impediment.

In *Re Woodall, ex p Woodall* [1884] 13 QBD 479, one Houlston had recovered a final judgment against Woodall. Houlston then died and his executrix served a bankruptcy notice on Woodall without obtaining leave from the court under r. 23 of O. XLII of the RSC 1883 to issue execution on the judgment. The bankruptcy notice not having been complied with, the executrix presented a bankruptcy petition. The registrar made a receiving order.

On appeal, the question for decision was whether the executrix was a 'creditor' within the meaning of s. 4 sub-s. 1(g) of the Bankruptcy Act 1883. It was argued that the representative of the person who originally obtained the final judgment does not fill the character of creditor under sub-s. 1(g), if he has not obtained leave under r. 23 to issue execution. In upholding that submission, Baggally LJ said:

> But those words ('and execution thereon not having been stayed' in sub-s. 1(g)) tend to show that the creditor spoken of must be a person who is in a position to issue execution upon the final judgment. The original creditor is in that position. If the person who applies for the notice is the executor of the original judgment creditor he does not, as I read the subsection, fill the required character until he has obtained leave to issue execution on the judgment.

The cases of *Re Ide* and *Re Woodall* have stood unchallenged for more than 100 years and I take it that they represent the law on the point concerned.

To my mind, it is not an unfair summary of the position in the UK to say that a creditor can issue a bankruptcy notice only when he has obtained a final judgment or a final order. The judgment or order must be one on which the creditor is in a position to issue execution so that if execution cannot be issued at all, no bankruptcy notice can be issued. If the execution can be issued only with leave of the court, the creditor must obtain such leave before he can issue a bankruptcy notice.

It was urged upon me by counsel for the judgment creditor that I should decline to follow the cases of *Re Ide* and *Re Woodall* because, in this country, unlike in the UK, we have r. 276 of the Bankruptcy Rules 1969 ('the BR'), which expressly provides that the Rules of the Supreme Court (now the Rules of the High Court 1980) regulating the procedure in its civil jurisdiction shall not apply to any proceedings in bankruptcy. Accordingly, it was submitted that there being no requirement in the BR that leave was required for commencing bankruptcy proceedings founded on a judgment entered more than six years previously, no such leave was required. As such, the only bar to the commencement of bankruptcy proceedings would be if and when a judgment creditor is barred by s. 6(3) of the Limitation Act 1953 – so ran counsel's submission.

> I regret I find counsel for the judgment creditor's submission regarding this part of the case unacceptable. In my opinion, the overriding consideration here is, as I have indicated, the proper interpretation of s. 3(1)(i) of our Act. I am not at liberty to brush aside the explicit provisions of s. 3(1)(i) merely because of r. 276 of the BR. Accordingly, if there is any conflict between these two measures I would regard s. 3(1)(i) as having overriding effect since it ranks as principal legislation whereas the BR are subsidiary legislation. (See s. 23(1) of the Interpretation (States of Malaysia) Act 1967). In my view, therefore, the UK decisions are of direct relevance when construing s. 3(1)(g) of our Act and I would respectfully follow them.
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> Accordingly, I must next consider whether, at the material time, the judgment creditor in this case was in a position to issue execution on his judgment. The question arises, what is the material time?

However, in the present appeal, I am faced with the additional difficulty that the judgment debtor only raised non-compliance with O. 46 in submission and not in his affidavit in support of his application. Had he raised this issue when he was served with the bankruptcy notice itself two years ago, it would have enabled the judgment creditor to obtain the requisite leave and initiate fresh bankruptcy proceedings against the judgment debtor. However, the judgment debtor elected not to do so and he must therefore bear the consequences of his neglect himself. Even in his affidavit at encl. (12) in support of his application at encl. (13), there is nary a whisper of this issue.

Having regard to the fact that the judgment creditor will totally lose its right of enforcing the judgment after 31 December 1997 and that O. 46 only requires the judgment creditor to obtain leave before proceeding and does not bar altogether the bringing of proceedings for execution after six years of the judgment being obtained, I would hold the failure to obtain leave as making the issuance of the bankruptcy notice voidable only and not void *ab initio*. Otherwise, it would result in injustice being perpetrated upon the judgment creditor whose mistake lay in giving repeated opportunities to the judgment debtor to honour his undertaking to settle the debt in instalment payments agreed upon between the parties.

I am fortified in the approach I take in this appeal by the decision of Abdul Kadir bin Sulaiman J in *Re Seow Yin Fong, ex Parte United Orient Leasing Company Berhad and Another Case* [1994] 2 CLJ 845 in another context where the argument was that the bankruptcy notices were void *ab initio* as the amounts owing were not quantified up to the date of the bankruptcy notices and that the notices included sums not yet due and owing. In dismissing the two applications by the respective judgment debtors to set aside the adjudication and receiving orders under s. 105 of the Bankruptcy Act 1967, his Lordship stated thus at p. 848 of the report of that case:

It is true that once a thing is a nullity it is null and void. But being the orders of the court, unless proper steps are taken to have the orders set aside, they remain as orders of the court. The power of the court to annul the adjudication under s. 105 of the Act is a discretionary one. Being a judicial discretion its exercise by the court must be in accordance with proper principles. The interest of the parties affected has to be taken into consideration in exercising the discretion. These applications of the applicants were filed after six years had run from the date of the orders made and at least four years after the Supreme Court decisions in *Low Mun's* and *Ghazali's* cases, *supra* ([1988] 1 MLJ 263 and [1989] 2 MLJ 142 respectively). No explanation at all was given by either of the applicants for this delay in bringing these applications to court. In his submission, the learned counsel for both applicants attempted to explain the delay by saying that the matter would not have been brought before the court had it not been for the two Supreme Court decisions. Be that as it may, but why does it take them four years to decide on the making of the applications? In his submission, the learned counsel for the applicants admitted that some creditors who have proved their debts are highly prejudiced if the applications are granted but he contends that it is irrelevent to consider when the court is satisfied that the bankruptcy notice is void *ab initio*. Thus it is put to the court that as the orders are a nullity, the issue of delay is irrelevant to consider. But on the other hand, what about the prejudice done to the innocent creditors in these cases? Are they to be penalised through no fault of theirs? For that reason, it is my view that, even if there is merit in law for annulling the adjudication orders made on both the applicants on grounds that the bankruptcy notices are void *ab initio,* serious prejudice would have been caused to the creditors if the applications are granted in the circumstances and if the decision to grant is followed, then it would open the floodgates for other applicants to do the same to the serious prejudice of innocent parties. In the circumstances of the case here, I am of the view that justice will not be served by going into the merits of the applications. So, the applications of both the applicants are hereby dismissed with costs to be taxed unless agreed.

For all the foregoing reasons, the appeal is allowed with costs and the order of the registrar cancelling and annulling ("dibatalkan dan dimansuhkan") the adjudication and receiving orders made on 18 April 1996 is set aside and the said orders are accordingly reinstated.

Reported by Ling Hea Hoon